Nos. 90-954 and 90-1004

In the Supreme Court of the United States

OCTOBER TERM, 1990

ROBERT C. RUFO, SHERIFF OF SUFFOLK COUNTY, ET AL., PETITIONERS

v.

INMATES OF THE SUFFOLK COUNTY JAIL, ET AL.

GEORGE C. VOSE, COMMISSIONER OF CORRECTION, PETITIONER

v.

INMATES OF THE SUFFOLK COUNTY JAIL, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

The United States will address the following question:

What is the appropriate standard for determining whether a sufficient showing has been made to warrant the modification of a consent decree specifying in detail measures to be taken to correct pre-existing unconstitutional conditions of confinement in a local penal institution?

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INTEREST OF THE UNITED STATES

Under the Civil Rights of Institutionalized Persons Act, 42 U.S.C. 1997 *et seq.*, the Attorney General is responsible for protecting the civil rights of persons institutionalized in state and municipal facilities; by

virtue of its role as operator of the federal prison system, the United States may be the defendant in prison reform litigation. Moreover, most federal pretrial detainees are housed in state or local facilities. Thus, the United States has a strong interest in the development of appropriate standards for the modification of consent decrees terminating prison reform litigation. And, in carrying out its wide-ranging operational and enforcement responsibilities under federal law, the federal government may enter into consent decrees to resolve litigation in which it is either a plaintiff seeking enforcement of constitutional or federal statutory requirements or a defendant charged with violating such requirements. If the standards articulated in this case apply beyond the prison reform context, the case could thus implicate the interests of the United States in a variety of situations.

STATEMENT

1. In this class action, inmates at the Suffolk County Jail in Boston, Massachusetts, brought suit against the Sheriff of Suffolk County and others, challenging the conditions of confinement for pretrial detainees at the jail. In June 1973, the federal district court ruled that those conditions violated the Due Process Clause of the Fourteenth Amendment. Pet. App. 23a-54a.[1]

The court found that the jail (which had been in continuous use since about 1848) was antiquated and posed a serious fire hazard; that the facility's plumbing system did not work properly; that there were rats and insects in the facility; and that the cells in which inmates were confined for almost twenty hours

[1] "Pet. App." references are to the petition in No. 90-954.

per day were small, dirty, hazardous to the health of the inmates, and subject to extremes in temperature. The court also noted that inmates were often housed two per cell in cells originally designed for single occupancy, and that inmates were double-celled without identifying those who could not safely be so housed. Pet. App. 25a-35a. The court concluded that these conditions, in sum, amounted to unconstitutional punishment of inmates who had not been convicted of a crime and were incarcerated awaiting trial. *Id.* at 40a. To remedy these unconstitutional conditions, the court ordered that no pretrial detainees be housed at the jail after June 30, 1976. *Id.* at 48a.[2] This deadline was extended on several occasions. *Id.* at 6a-7a.

After further litigation, see *Inmates of Suffolk County Jail* v. *Kearney*, 573 F.2d 98 (1st Cir. 1978), and lengthy negotiations concerning whether (and when) the defendants would be required to close the jail completely, final remedial relief was entered in May 1979 in a consent decree that provided for the construction of a new jail. Pet. App. 15a-22a.[3] The consent decree incorporated by reference a comprehensive architectural plan describing in detail various features of the new jail. *Id.* at 16a; see C.A. App. 181-290 (architectural plan).[4]

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[2] The court also ordered that pretrial detainees at the jail not be double-celled after November 30, 1973. Pet. App. 48a.

[3] Construction of the new facility began in 1987, and was completed in 1990.

[4] These features included modular housing units (C.A. App. 236), each with its own kitchenette and recreation area (*id.* at 238), inmate laundry rooms (*id.* at 244), education units (*id.* at 250), and indoor and outdoor exercise areas (*id.* at 256, 260). See also J.A. 136 ("All areas within the new jail are climate controlled.").

The plan provided for single occupancy cells (C.A. App. 236); the jail was to contain a total of 309 such cells. Pet. App. 7a. The number of cells was based on projections predicting a decline in the prison population. C.A. App. 189. By 1985, however, "[t]he parties realized that the projections of the detainee population on which the original plans were based were flawed, and that a jail with a larger capacity would be needed." Pet. App. 7a-8a. Plaintiffs, with the defendants' consent, moved to modify the architectural plan contained in the consent decree to provide for 435 cells. C.A. App. 354. The district court granted the requested modification, citing "the unanticipated increase in jail population." Order of April 11, 1985 (J.A. 110). The district court's order states that "single-cell occupancy [must be] maintained." J.A. 111; see Pet. App. 8a. The design of the new jail was later further changed to contain 453 cells. 90-954 Pet. 5.

2. On July 17, 1989, petitioner Rufo, the Sheriff of Suffolk County, filed a motion in district court seeking modification of the consent decree to permit double occupancy in 200 of the new jail's 282 "regular male housing cells." J.A. 246. The Sheriff asserted that double-celling was required because of continuing increases in the Suffolk County pretrial detainee population. The Sheriff's proposal contemplated that no inmate would be double-celled unless found fit to share a cell with another inmate, and "[d]ouble-celled pretrial detainees would be out of their cells for 12 hours per day." J.A. 143. Relying on this Court's decision in *Bell* v. *Wolfish*, 441 U.S. 520 (1979) (holding that double-celling of pretrial detainees is not *per se* unconstitutional), the Sheriff contended that in light of the state-of-the-art nature

of the new facility, double-celling of pretrial detainees in that facility could not be considered unconstitutional. J.A. 209; see also Pet. App. 12a.

The district court denied the Sheriff's motion for modification. Pet. App. 5a-14a. Quoting this Court's decision in *United States* v. *Swift & Co.*, 286 U.S. 106, 119 (1932), the court stated that "[n]othing less than a clear showing of grievous wrong evoked by new and unforeseen conditions should lead us to change what was decreed after years of litigation with the consent of all concerned." Pet. App. 8a. The court determined that, under this standard, there was no change in the pertinent legal framework or factual circumstances that warranted modification.

The district court first rejected the Sheriff's contention that this Court's decision in *Bell* v. *Wolfish*, *supra*, represented a change in the law justifying deviation from a single occupancy requirement. Pet. App. 8a-10a. It noted that although *Bell* held that double-celling of pretrial detainees was not *per se* unconstitutional, it "did not directly overrule any legal interpretation on which the 1979 consent decree was based." *Id.* at 10a. The court also rejected the contention that increases in the pretrial detainee population constituted a changed factual condition that warranted modification of the consent decree's single occupancy requirement. The court recognized that "increases in jail populations are difficult to predict and are beyond the control of the Sheriff" (*id.* at 11a), but observed that "the overcrowding problem faced by the Sheriff is neither new nor unforeseen. It has been an ongoing problem during the course of this litigation, both before and after entry of the consent decree" (*id.* at 10a).

After rejecting the motion for modification under the *Swift* standard, the district court acknowledged

that some courts of appeals have applied a less stringent standard to requests, like this one, for modification of consent decrees in institutional reform litigation. Pet. App. 11a. The district court noted that, "[u]nder this standard, a court may grant a modification if a defendant establishes that some change in circumstances has occurred from the time the decree was negotiated and approved and that the defendant has attempted to comply with the decree in good faith, and if the modification requested does not frustrate the original overall purposes of the decree." *Ibid.* The court stated, however, that the requested modification would not be appropriate even under this alternative test. *Id.* at 11a-12a.

The court reasoned that "[t]he proposed modification would violate one of the primary purposes of the decree—to provide conditions of confinement for Suffolk County pretrial detainees that meet agreed-upon standards." Pet. App. 12a. According to the court, "[a] separate cell for each detainee has always been an important element of the relief sought in this litigation—perhaps even the most important element." *Ibid.* Thus, "[t]he type of modification sought here would not comply with the overall purpose of the consent decree; it would set aside the obligations of that decree." *Ibid.*

Finally, the district court rejected the argument that modification of the consent decree's single occupancy rule was warranted because petitioner's double-celling proposal was assertedly in full compliance with constitutional requirements. The court explained that "[d]efendants' agreement in this case was a firm one, and not merely an agreement to comply with the decree * * * until it arguably required more of the defendants than the absolute minimum

they would be constitutionally required to provide." Pet. App. 12a-13a. The court also rejected the argument that modification was appropriate because adherence to a single-celling requirement might result in the release of some pretrial detainees. *Id.* at 13a.

3. In a brief, *per curiam* opinion, the court of appeals affirmed, stating that "[w]e are in agreement with the well-reasoned opinion of the district court and see no reason to elaborate further." Pet. App. 2a.

SUMMARY OF ARGUMENT

1. A consent decree, like a contract, is the result of the agreement of the parties. At the same time, like any judicial decree, it constitutes a judicial act. As an agreement—a settlement of a dispute that has reached the stage of litigation—it serves the important purposes of reducing the risk and cost of litigation, of conserving scarce judicial resources, and of facilitating a resolution that may be more acceptable to both parties than one imposed from without. But as a judicial decree, which involves the court itself in continuing supervision, it must be subject to modification, even without the consent of all parties, if enforcement of the decree as originally entered would be inequitable and would not serve the public interest.

The appropriate standard for modifying a consent decree, over the objection of one of the parties, should strike the proper balance between these two aspects of such a decree. This standard, in our view, varies with the nature of the decree and the underlying controversy. In the context of institutional reform litigation such as this, we believe that, while consent decrees perform a valuable function and should not be subject to modification without a sufficient show-

ing of need, substantial weight should be given to the judicial aspect of the decree.

2. The district court in this case relied heavily, and in our view incorrectly, on this Court's statement in *Swift* that only a "grievous wrong evoked by new and unforeseen conditions" would warrant modification of a consent decree over a party's opposition. That language was not intended as a universally applicable test; indeed its limited applicability was made clear in *Swift* itself and in a number of subsequent decisions of this Court.

Unlike *Swift*, the consent decree in this case is designed to change the nature and operation of a public institution in order to bring it into compliance with constitutional standards, and modification of the decree is sought by the public institution, not by a private party. In these circumstances, involving not simply prohibitory provisions but affirmative obligations requiring significant public expenditures, a less stringent standard than that applied in *Swift* is appropriate. Such a standard should take into account significant changes in the constitutional landscape against which the original decree was crafted, as well as significant changes in the relevant factual conditions. Thus, modification may be warranted if such changes have made compliance significantly more difficult, despite good faith efforts, and if the requested modification would not thwart a central purpose of the decree.

The need for a more flexible standard in the institutional reform context is underscored by two additional factors. First, when such a decree is entered against a public institution, the impact of the decree on the public interest, indeed its direct impact on persons not parties to the decree, is likely to be

greater than in the case of a consent decree between private parties, or against a private defendant. Second, the role of the federal court as supervisor and enforcer of a decree against a public institution is likely to raise important questions of federalism, of separation of powers, or both. Such questions militate in favor of greater flexibility than may be appropriate in a less sensitive context.

In view of the consideration given to the *Swift* standard by the lower courts in this case, and the difficulty of ascertaining how much reliance was placed on that standard in rejecting the requested modification, we believe the case should be remanded to the court of appeals for consideration of the request in light of this Court's decision.

ARGUMENT

I. THE CHARACTER AND UTILITY OF CONSENT DECREES

A. A consent decree is a court order that embodies the terms of an agreement by the parties disposing of litigation. It has attributes of both contracts and judicial decrees. On the one hand, consent decrees resemble contracts "because their terms are arrived at through mutual agreement of the parties." *Local 93, Int'l Ass'n of Firefighters* v. *Cleveland (Firefighters)*, 478 U.S. 501, 519 (1986); *United States* v. *ITT Continental Baking*, 420 U.S. 223, 236 (1975); *United States* v. *Armour & Co.*, 402 U.S. 673, 681 (1971). On the other hand, "they are motivated by threatened or pending litigation and must be approved by the court" (*ITT Continental Baking*, 420 U.S. at 236 n.10). Thus, a consent decree is a "judicial act." *Swift*, 286 U.S. at 115. Accordingly, "consent decrees bear some of the earmarks of judgments

entered after litigation." *Firefighters*, 478 U.S. at 519.

"Because of this dual character, consent decrees are treated as contracts for some purposes but not for others." *ITT Continental Baking*, 420 U.S. at 237 n.10; *Firefighters*, 478 U.S. at 519. Consent decrees typically contain precise terms that are the result of negotiation and compromise. *Armour*, 402 U.S. at 681; *ITT Continental Baking*, 420 U.S. at 235. Thus, if the parties' agreement can "lightly be undone" (*Swift*, 286 U.S. at 120), either party can improperly be deprived of the benefit of its bargain. But a consent decree is not merely a contract; it is also an order entered (and ultimately enforceable) by a court, and "a sound judicial discretion may call for the modification of the terms of an injunctive decree if the circumstances, whether of law or fact, obtaining at the time of its issuance have changed or new ones have since arisen." *System Federation No. 91* v. *Wright*, 364 U.S. 642, 647 (1961). See Fed. R. Civ. P. 60(b)(5) (court may relieve party from a final judgment when "it is no longer equitable"). Thus, "[t]he type of decree the parties bargained for is the same as the only type of decree a court can properly grant—one with all those strengths and infirmities of any litigated decree which arise out of the fact that the court will not continue to exercise its powers thereunder when a change in law or facts has made inequitable what was once equitable." *Wright*, 364 U.S. at 652. "[A] federal court is more than 'a recorder of contracts' from whom parties can purchase injunctions," *Firefighters*, 478 U.S. at 525, and "[t]he parties cannot, by giving each other consideration, purchase from a court of equity a continuing injunction." *Wright*, 364 U.S. at 651.

B. Consent decrees are widely used to facilitate settlement because they enable parties to resolve complex disputes without incurring the costs and risks of litigating through all stages of trial and appeal. *Firefighters*, 478 U.S. at 528; *Armour*, 402 U.S. at 681. They also conserve scarce judicial resources. In addition, in large-scale institutional reform litigation, they permit the parties to formulate terms that are more suitable than the solution that might be imposed by a court that is comparatively inexpert and unfamiliar with the details of the underlying controversy. See *Kozlowski* v. *Coughlin*, 871 F.2d 241, 247 (2d Cir. 1989).

The assessment of whether modification of a consent decree is warranted in a particular case is a matter for the district court's equitable discretion. See Fed. R. Civ. P. 60(b). Because that assessment must turn on an evaluation of the particular circumstances in each case, it is inappropriate to attempt to prescribe precise rules to govern the exercise of the court's discretion. Nevertheless, the benefits that flow from the use of consent decrees will be maximized by the articulation of an appropriate standard under which that discretion is to be exercised, a standard that acknowledges and accommodates the decree's inherently "hybrid nature" (*Firefighters*, 478 U.S. at 519).

A standard that allows unconsented modifications too freely may inhibit litigants from entering into consent decrees in the first instance. Consent decrees "are normally compromises in which the parties give up something they might have won," *ITT Continental Baking*, 420 U.S. at 235 (1975). One of the incentives for this compromise is the assurance that the opposing party will be held to the agreement. If the

agreed-upon terms of the decree are subject to modification under standards that are not sufficiently stringent, that assurance is undermined, and neither party can rely on retaining the benefits of the bargain. Thus, the incentives for entering into a consent decree are reduced. See *Alliance To End Repression* v. *Chicago*, 742 F.2d 1007, 1020 (7th Cir. 1984) (en banc); *The Money Store, Inc.* v. *Harriscorp Finance, Inc.*, 885 F.2d 369, 377 (7th Cir. 1989) (Posner, J., concurring).

On the other hand, a modification standard that is too demanding is also likely to inhibit the negotiation of consent decrees, particularly in institutional reform cases where they typically contemplate "continuing supervision by the issuing court" (*Wright*, 364 U.S. at 647). Under such a standard, government authorities will be reluctant to agree to specific terms in a remedial scheme that could be "locked in[] * * * however the future may unfold," *Duran* v. *Elrod*, 760 F.2d 756, 762 (7th Cir. 1985), and to take the risk that any one of the decree's numerous, detailed provisions will remain in force even after experience and evolving circumstances have rendered it no longer suitable. Instead, responsible officials might well choose to assume the risks of litigation, relying on the court to impose the "bare minimum" relief required by statutory and constitutional constraints. *Philadelphia Welfare Rights Organization* v. *Shapp*, 602 F.2d 1114, 1120 (3d Cir. 1979), cert. denied, 444 U.S. 1026 (1980).

C. As is set forth in more detail in the following discussion, we believe that in the context of institutional reform litigation, substantial weight should be given to the judicial aspect of a consent decree. Unlike agreements regulating the conduct of private

parties, a consent decree that imposes wide-ranging, affirmative obligations aimed at effecting large-scale and long-term restructuring of a public institution may require significant adjustment in order to adapt the terms of the parties' original agreement to current experience and conditions. Thus, in this context, consent decrees cannot reasonably be presumed to embody a firm expectation by the parties that all of the terms of their agreement will inevitably continue to retain vitality in the face of necessarily uncertain future developments. Moreover, consent decrees governing the administration and operation of public facilities necessarily implicate the public interest, and the public fisc. Finally, a refusal to modify a consent decree governing a public institution, when an adequate showing of need has been made, may raise serious separation of powers and federalism concerns.

II. THE *SWIFT* STANDARD—REQUIRING A "CLEAR SHOWING OF GRIEVOUS WRONG"—IS INAPPROPRIATE IN THE CONTEXT OF THIS CASE

The district court, relying on this Court's decision in *Swift*, concluded that "[n]othing less than a clear showing of grievous wrong evoked by new and unforeseen conditions should lead us to change what was decreed after years of litigation with the consent of all concerned." Pet. App. 8a (quoting 286 U.S. at 119). The district court also acknowledged that some courts have applied a less stringent standard in considering requests to modify consent decrees in institutional reform litigation, but found that under any standard, there was no basis for granting a modification that would disturb one of the most important agreed-upon terms of the consent decree. The court's consideration of the request under an alternative standard was, however, somewhat cursory, since it

found itself constrained by circuit precedent to apply the *Swift* standard.[5] We submit that, as a general matter, there are such significant differences between the type of consent decree involved in *Swift* and a decree that terminates institutional reform litigation that the *Swift* standard should not apply in the latter context.

A. The *Swift* decision itself indicates that the standard there applied was not intended as a universally applicable test to determine when a court should grant a motion to modify a consent decree. The decree in *Swift*, which terminated a government antitrust action against the five leading meat packers in the United States, enjoined the defendants from engaging in any aspect of the grocery business. 286 U.S. at 111. Ten years later, the defendants moved, over the government's opposition, to modify the decree, claiming that changes within the industry warranted a modification to allow them to deal in groceries at the wholesale level. *Id.* at 112-114. This Court rejected that claim. Noting that the antitrust action in 1920 was premised on evidence that the defendants had engaged in gross abuses designed to limit competition unfairly, the Court explained that the record showed that the potential for this "ruth-

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[5] The court of appeals simply affirmed the denial of modification on the basis of the district court's decision. However, in a subsequent request for an interpretation of other terms of the same decree, the court of appeals approved the same district judge's acknowledgment that "courts in public law cases 'often must undertake a "continuing" involvement in the case, an involvement requiring flexibility * * * in the determination of the appropriate response to ensuing requests for "* * * modification of the original order in light of changing circumstances."'" *Inmates of Suffolk County Jail* v. *Kearney*, No. 90-1858, slip op. 7-8 (1st Cir. Mar. 21, 1991) (quoting Order of Keeton, J.).

less and oppressive" misconduct still existed (*id.* at 119). While changes in the industry had occurred, the Court found that the concerns about abusive and unlawful practices that led to the imposition of the consent decree remained, and the defendants were not suffering "extreme hardship" by virtue of the decree. Under these circumstances, "[n]othing less than a clear showing of grievous wrong evoked by new and unforeseen conditions should lead us to change what was decreed after years of litigation with the consent of all concerned." *Ibid.*

The Court in *Swift* carefully distinguished decrees imposing "restraints that give protection to rights fully accrued upon facts so nearly permanent as to be substantially impervious to change, and those that involve the supervision of changed conduct or conditions and are thus provisional and tentative." 286 U.S. at 114. *Swift* itself involved "fully accrued" facts; in contrast, "[a] continuing decree of injunction directed to events to come is subject always to adaptation as events may shape the need," *ibid.*, and "consent is to be read as directed toward events as they then were." *Id.* at 115. Consent is "not an abandonment of the right to exact revision in the future, if revision should become necessary in adaptation to events to be." *Ibid.*

The Court's discussion in *Swift* thus suggests that modification of decrees that "involve the supervision of changed conduct or conditions and are thus provisional and tentative," may be appropriate "in adaptation to events to be," *id.* at 114-115, and that, accordingly, the modification standard in such a setting should be less stringent than the one applied in *Swift* itself.

Subsequent cases confirm this view of *Swift*. In *United States* v. *United Shoe Machinery Corp.*, 391 U.S.

244, 248 (1968), the Court approved a government motion to modify an injunctive decree, observing that the *Swift* "grievous wrong" language "must, of course, be read in light of th[e] context [of *Swift*]." Accord *Board of Education* v. *Dowell*, 111 S.Ct. 630, 636 (1991). And in *Chrysler Corp.* v. *United States*, 316 U.S. 556 (1942) (and *System Federation No. 91* v. *Wright*, *supra*), the Court cited *Swift* in allowing modifications of consent decrees, but did not refer to the "grievous wrong" standard.[6] Instead, in *Chrysler* the Court stated that, in determining whether to modify a consent decree, "the test to be applied * * * is whether the change serve[s] to effectuate or to thwart the basic purpose of the original consent decree." 316 U.S. at 562.

B. In contrast to the situation in *Swift*, the litigation in many "institutional reform" cases aims at effecting wide-ranging and large-scale changes in the nature and operation of a public institution in order to bring it into compliance with applicable constitutional standards. Moreover, modification is sought, not by a private party, but by a governmental body. Such litigation, brought against a federal, state, or local government entity, is unlike litigation against a private party, and, for several reasons, the distinctive character of decrees entered in this context militates in favor of a less stringent standard for modification than that articulated in *Swift*. Accord, *e.g.*, *New York State Association For Retarded Children* v. *Carey*, 706 F.2d 956, 969-971 (2d Cir.) (Friendly, J.), cert. denied, 464 U.S. 915 (1983); *Shapp*, 602 F.2d at 1119-1121; *Plyler* v. *Evatt*, 846 F.2d 208, 211-212 (4th Cir.), cert. denied, 488 U.S. 897

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[6] *Dowell* and *Wright* are discussed more fully below. See pp. 26-28 (*Dowell*), 19-20 (*Wright*), *infra*.

(1988); *Heath* v. *De Courcy*, 888 F.2d 1105, 1109-1110 (6th Cir. 1989). See also *Ruiz* v. *Lynaugh*, 811 F.2d 856, 861 & n.8 (5th Cir. 1987); *id.* at 863 & n.1 (concurring opinion); *Alliance To End Repression*, 742 F.2d at 1020; *Hodge* v. *Department of Housing & Urban Development*, 862 F.2d 859, 862-864 (11th Cir. 1989); Note, *The Modification Of Consent Decrees In Institutional Reform Litigation*, 99 Harv. L. Rev. 1020 (1986).

1. A less stringent standard than that applied in *Swift* is warranted because developments that occur during the long-term implementation of a complex, ongoing institutional reform decree may necessitate that particular features of the decree be altered. *Shapp*, 602 F.2d at 1120; *Carey*, 706 F.2d at 970. As this case well illustrates, a salient feature of institutional reform litigation brought against a governmental entity is that the litigation is not aimed simply at enjoining a particular course of unlawful conduct in which the defendant is engaged. Rather, the litigation also seeks—often as its primary purpose—to restructure a public institution in order to ensure that in the future it is maintained in compliance with constitutional norms.

Because the goal of such cases is to alter substantially the nature of a large and complex facility—perhaps even replacing an existing regime for the administration of a government program—consent decrees entered in resolution of these matters typically are not limited to prohibitory directives of the kind involved in *Swift*. Instead, they impose numerous affirmative obligations upon the defendants, often requiring the expenditure of substantial public funds. Here, for example, respondents contended, and the district court found, that conditions at the existing Suffolk

County jail were unconstitutional. But the consent decree that ultimately resulted did not simply order the termination of specific practices found to be unlawful. Rather, the centerpiece of the decree was an order affirmatively requiring the defendants to build an entirely new detention facility, and establishing detailed standards for that facility.

Decrees like the one in this case are aimed at systemic, affirmative reform; because of the nature of the duties imposed, they necessarily contemplate that compliance with the decree will be achieved over a substantial period of time.[7] Where, as here, implementation of the decree's provisions calls for a public body to make fundamental changes in the nature or operation of a facility or program, it is not contemplated that full implementation will be achieved immediately. Thus, the decree in this case did not require that pretrial detainees be given the benefits of the new housing at once, and, in fact, construction of the new facility was not completed until more than ten years after entry of the decree.

The fact that this kind of consent decree contemplates an ongoing process of compliance over a substantial period of time bears on the appropriate modification standard. Actions taken to achieve full compliance with such a decree necessarily take place in the future, in circumstances that cannot be fully predicted when the decree is drafted. See, *e.g.*, *Carey*, 706 F.2d at 970 n.17 (quoting Chayes, *Foreword: Public Law Litigation And The Burger Court*, 96

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[7] They may also, as in *Board of Education* v. *Dowell*, 111 S. Ct. 630, 631-632 (1991), be transitional—*i.e.*, they may impose requirements that are designed to ensure that compliance with applicable norms is achieved, but that cease to be appropriate once compliance is achieved.

Harv. L. Rev. 4, 56 (1982)); *Plyler*, 846 F.2d at 212 (same); *Ruiz*, 811 F.2d at 863 (concurring opinion) (same); see also *Shapp*, 602 F.2d at 1120 ("Any injunction imposing mandatory affirmative duties for the future involves elements of prediction."). Over time, the premises underlying the original decree may be undermined by new conditions, resulting from changes either in the applicable law or in the relevant facts. Adjustment of the terms of the decree may be necessary to accommodate such new conditions. See *Carey*, 706 F.2d at 970.

Perhaps the clearest example of the kind of changed condition that would warrant a modification is a change in the law that expressly authorizes a condition that the consent decree—in accordance with then prevailing law—was designed to prevent. For example, in *System Federation No. 91* v. *Wright*, *supra*, a railroad and its unions were sued on the ground that they discriminated against nonunion employees, in violation of the Railway Labor Act, 45 U.S.C. 151 *et seq.* The litigation resulted in a consent decree that bound defendants not to engage in such discrimination. When the Railway Labor Act was later amended to permit union shop clauses in collective bargaining agreements, this Court held that the district court should have granted the motion of the union defendants to modify the consent decree to permit the negotiation of such a clause. Because the consent decree enjoined conduct that was now explicitly *authorized* by the statute, the Court concluded that equity required the modification. Although it recognized the importance of "[f]irmness and stability" in judicial decrees (364 U.S. at 647), that value, like the parties' interest in preserving the

benefits of their bargain, had to yield to the public policy expressed in the newly enacted law.[8] Accord *Theriault* v. *Smith*, 523 F.2d 601, 602 (1st Cir. 1975) (consent decree obligating defendant to pay AFDC benefits "pursuant to [specified statutory provisions]" modified when Supreme Court held that specified provisions did not authorize the payments).

The situation in *Wright* is to be distinguished from the case in which a consent decree prohibits actions whose constitutionality—though in doubt at the time the decree was entered—has been subsequently established by this Court's decision. Such a decision resolving the question of constitutionality, while upholding the validity of a particular practice, does not represent an expression of federal policy approving that practice.[9] The consent decree represents the par-

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[8] The Court explained that its conclusion "would not be affected by the circumstance, which the District Court here found, that the unions' hostility to nonunion employees still continued, for any discriminations that might be facilitated by the union shop clause have been legislatively determined to be an expense more than offset by the benefits of such a provision." 364 U.S. at 648-649.

[9] For example, *Bell* v. *Wolfish*, *supra*, which rejected a challenge to the constitutionality of double-celling, did not represent a policy decision *endorsing* such housing. In contrast, in amending the Railway Labor Act, Congress weighed the merits of various labor policies and specifically endorsed union shops. The amendment thus conflicted with the consent decree's *prohibition* of such clauses. *Bell*, in contrast, cast no doubt on the propriety of the single-cell requirement to which the parties here had agreed.

We note that in *Firefighters*, this Court held that a court is not necessarily barred from entering an enforceable consent decree obligating the defendant to provide relief that the court could not have imposed in the absence of consent. 478 U.S. at 525. But in considering whether modification of a con-

ties' decision that a compromise is preferable to pursuing the legal issue to ultimate resolution. Thus, a party is not automatically entitled to the modification of a consent decree whenever subsequent legal developments clarify legal obligations that were unsettled at the time the decree was negotiated.[10] The occurrence of such a clarification may, however, be a relevant factor for the court to consider in determining whether the total situation has changed sufficiently to warrant a modification.

Changed factual conditions are also relevant in determining whether a modification of a consent decree is warranted. The essential question is whether, in light of the changed circumstances, the proposed modification accords with the original purposes of the decree.[11] See, *e.g.*, *Carey*, 706 F.2d at 968-

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sent decree is warranted, it is significant that in the same decision, the Court stressed that "a federal court is more than a 'recorder of contracts' from whom parties can purchase injunctions; it is 'an organ of government constituted to make judicial decisions.'" *Ibid.* (citations omitted). Thus, while the fit between what a court may order without the agreement of the parties and what a court may approve in a consent decree may not be exact, the legal landscape against which the decree must operate remains highly relevant, since the purpose of the decree is to "further the objectives of the law upon which the complaint was based." *Ibid.* (citations omitted). Cf. *Firefighters Local Union 1784* v. *Stotts*, 467 U.S. 561 (1984) (court may not modify a consent decree to impose conditions on a defendant to which it did not consent and that are not required by applicable law).

[10] This is particularly true where, as here, the resolution of the issue was obviously imminent when the consent decree was negotiated. See Pet. App. 9a (*Bell* decided one week after consent decree approved).

[11] Of course, where a consent decree terminates litigation before a finding of liability has been entered, the court may not, in the interests of achieving the purposes of the consent

969; *Shapp*, 602 F.2d at 1120. Cf. *Chrysler*, 316 U.S. at 562 (in considering modification of a consent decree "the test to be applied * * * is whether the change served to effectuate or to thwart the basic purpose of the original consent decree"); *United States* v. *United Shoe Machinery Corp.*, 391 U.S. 244, 249 (1968) (modification appropriate where designed "to achieve the purposes of the provisions of the decree").[12] Modification may be appropriate even if the new circumstances were not entirely unforeseeable when the decree was entered.[13] For example,

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decree, impose on the defendant additional burdens beyond those it agreed to assume. Even where, as here, the consent decree is entered after an adjudication of liability, additional burdens beyond those agreed to may not be imposed by modification of the decree unless those burdens are required by applicable law. See *Stotts*, 467 U.S. at 576-579; cf. *Armour*, 402 U.S. at 682.

[12] Bearing in mind the judicial as well as the contractual aspects of the decree, the purposes of the decree cannot be determined on a motion for modification solely on the basis of the terms of the decree. Compare *Chrysler*, 316 U.S. at 562, with *Armour*, 402 U.S. at 681-682. It is appropriate, in the context of litigation such as this, to look also to such factors as the wrongs alleged in the complaint, the judicial findings and conclusions, if any, on which the decree was based, and the constitutional objectives that the parties and the court were attempting to attain.

[13] The foreseeability of the change may nevertheless be relevant to determining whether the proposed modification is consistent with the purposes of the decree; presumably, the parties' consent to the decree was based on their anticipation of a range of predictable future events. Cf. *Ruiz* v. *Lynaugh*, 811 F.2d 856 (5th Cir. 1987) (denying modification motion in prison overcrowding context); *Twelve John Does* v. *District of Columbia*, 861 F.2d 295 (D.C. Cir. 1988) (same). Moreover, to the extent that changed conditions reasonably can be anticipated, the parties can provide for such contin-

experience in operating under a decree may demonstrate that, despite good faith efforts by the defendant to comply with its terms, a particular goal is unattainable or a particular provision of the decree is unworkable. See, *e.g.*, *Shapp*, 602 F.2d at 1118, 1120 (State unable to find enough clients to provide required number of medical tests); *Carey*, 706 F.2d at 971 (State unable to find sufficient housing facilities of required size). See also p. 18 note 7, *supra*.

A good faith effort to comply with the decree's requirements is an essential prerequisite; a defendant may not obtain a modification of a consent decree simply because it discovers that its interests are not well served by its judicially approved bargain. See *Alliance To End Repression*, 742 F.2d at 1020 ("who will make a binding agreement with a party that is free to walk away from the agreement whenever it begins to pinch?"). The new condition must be a significant change from the conditions prevailing when the decree was entered—one that makes compliance with the decree substantially more onerous. For example, in this case, it was anticipated in 1979 that the Suffolk County pretrial detainee population would decline, and the original decree was negotiated on this assumption. 90-954 Pet. 3-4. When that assumption proved incorrect, the decree was modified by mutual agreement in 1985 to provide for a greater

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gencies in the original decree. Cf. *Chrysler Corp.* v. *United States*, 316 U.S. 556 (1942) (consent decree provided that certain restrictions would be lifted if no final order entered in related litigation by specified date); *United States* v. *Wheeling-Pittsburgh Steel Corp.*, 818 F.2d 1077 (3d Cir. 1987); 42 U.S.C. 9622(f)(6) (covenant not to sue pursuant to a consent decree must contain provision permitting United States to reopen litigation if pollution is worse than anticipated).

number of cells, to take into account "the unanticipated increase in jail population." J.A. 110. Cf. *Rhodes* v. *Chapman*, 452 U.S. 337, 350-351 n.15 (1981).[14]

2. In the context of institutional reform litigation, the inquiry whether a modification is warranted must also be informed by substantial public interest considerations. Unlike consent decrees entered against private parties, as in *Swift*, consent decrees that are entered against public bodies and that involve large-scale restructuring of government facilities necessarily "reach beyond the parties involved directly in the suit and impact on the public's right to the sound and efficient operation of its institutions." *Heath*, 888 F.2d at 1109; accord *Plyler*, 846 F.2d at 215; *Duran*, 760 F.2d at 759, 762.[15] Satisfactory resolution of the question whether and to what extent such a decree should be modified in a particular set of circumstances requires that weight be given to the potential effect on the public interest, for the court is not simply "a recorder of contracts," bound by the parties' agreement to maintain a continuing injunction. *Firefighters*, 478 U.S. at 525; *Wright*, 364 U.S. at 651. Thus, in this case, if—as a result of significantly changed conditions—adherence to a single-celling regime requires the release of some detainees who would otherwise remain incarcerated, see Pet. App. 13a, denying modification may be adverse to the public interest by rendering law enforcement less effective and impairing the security of the community.

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[14] It is unclear whether the increases in the pretrial detainee population since 1985 present a similarly significant changed condition.

[15] Although substantial public interest concerns were also involved in *Swift*, as in all government antitrust litigation, they did not support the requested modification.

See *Heath*, 888 F.2d at 1106-1110 (considering the public's interest and allowing modification of consent decree to permit double-celling); *Plyler*, 846 F.2d at 209-216 (same); *Duran*, 760 F.2d at 757-763 (same); *Nelson* v. *Collins*, 659 F.2d 420 (4th Cir. 1981) (en banc) (same).

3. The standard for the modification of consent decrees terminating institutional reform litigation should also reflect federalism and separation of powers concerns. As this case illustrates, institutional reform litigation against state and local officials may place the district court in the position of supervising and overseeing a "complex, ongoing remedial decree" involving a public institution. *Shapp*, 602 F.2d at 1120; *Carey*, 706 F.2d at 970. Moreover, such decrees may require substantial public expenditures over a significant period of time. By effectively locking in the terms of a federal court order that may no longer be appropriate or necessary, an overly stringent standard for considering modification motions intrudes upon the discretion normally reserved to state and local officials charged with the responsibility for efficient administration. See, *e.g.*, *Ruiz*, 811 F.2d at 863 (Hill, J., concurring) (federal court involved in institutional reform litigation "must balance its duty to protect federal constitutional and statutory rights with the delicate problems of federalism and separation of powers which are always implicated when a federal court directs state authorities to take certain actions in administering a state-run institution").[16]

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[16] State or local officials may sometimes willingly allow themselves to become locked in to inappropriately burdensome obligations by means of a consent decree, in order to evade political constraints or to limit the policy discretion of officials in succeeding administrations. See, *e.g.*, *Kasper* v. *Board Of Election Commissioners*, 814 F.2d 332, 340-342 (7th Cir. 1987); cf. *Newman* v. *Graddick*, 740 F.2d 1513, 1517 (11th

These concerns about the proper relationship between the federal courts and state and local governments are reflected in *Board of Education* v. *Dowell*, 111 S. Ct. 630 (1991), where the question was whether termination of an ongoing school desegregation decree was warranted on the ground that the decree was no longer necessary to achieve compliance with constitutional requirements. The court of appeals held that termination was inappropriate, but this Court reversed. The Court reasoned that continuing exercise of the federal courts' jurisdiction, after compliance had been achieved, would improperly intrude into the discretion of local school authorities, thereby colliding with important "[c]onsiderations based on the allocation of powers within our federal system" (111 S. Ct. at 637). Although *Dowell* did not involve a consent decree, it suggests that, in con-

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Cir. 1984) (noting that state officials entered into consent decree on the "last day of their administration").

Similar problems may arise when a court enters a consent decree against a federal officer or agency that purports to bind succeeding administrations on major points of discretionary policy. See *Citizens For A Better Environment* v. *Gorsuch*, 718 F.2d 1117, 1134 (D.C. Cir. 1983) (Wilkey, J., dissenting) ("For reasons that ultimately have to do with preserving the democratic nature of our Republic, American courts have never allowed an agency chief to bind his successor in the exercise of his discretion."), cert. denied, 467 U.S. 1219 (1984); *National Audubon Society* v. *Watt*, 678 F.2d 299, 301 (D.C. Cir. 1982) (noting "potentially serious constitutional questions about the power of the Executive Branch to restrict its exercise of discretion by contract with a private party"); *Alliance To End Repression*, 742 F.2d at 1020 (interpreting FBI consent decree to ensure that "co-equal branch of government" did not "improvidently surrender[] its obligations"; thus "maintain[ing] a proper separation of powers"); *The Money Store*, 885 F.2d at 375-376 (Posner, J., concurring).

sidering a state or local governmental body's motion to modify an injunctive decree, delineation of the proper scope of the district courts' equitable discretion must be informed by the values of federalism. Cf. *Duran*, 760 F.2d at 759.

To be sure, *Dowell* itself turned on the special context of school desegregation (111 S. Ct. at 637). But the principle that federal courts must act with due regard for the administrative discretion properly reserved to state and local officials has been repeatedly emphasized in this Court's decisions dealing with prison conditions—the context of this case. See, *e.g.*, *Thornburgh* v. *Abbott*, 490 U.S. 401, 407-408 (1989); *Turner* v. *Safley*, 482 U.S. 78, 84-85 (1987); *Rhodes*, 452 U.S. at 351 & n.16, 352; *Bell*, 441 U.S. at 540-541 n.23, 547 & n.29; *Preiser* v. *Rodriguez*, 411 U.S. 475, 492 (1973).

In these decisions, this Court has admonished that "the judiciary is 'ill equipped' to deal with the difficult and delicate problems of prison management," *Thornburgh*, 490 U.S. at 407-408, and that, accordingly, in determining whether conditions of confinement fail to satisfy constitutional requirements so as to warrant an injunctive decree, the courts must keep in mind that "[r]unning a prison is an inordinately difficult undertaking that requires expertise, planning, and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of government." *Turner*, 482 U.S. at 84-85. Moreover, "[w]here a state penal system is involved, federal courts have * * * additional reason to accord deference to the appropriate prison authorities," *id.* at 85; "internal problems of state prisons involve issues * * * peculiarly within state authority and expertise, [and] the States have an

important interest in not being bypassed in the correction of those problems." *Preiser*, 411 U.S. at 492.[17]

As *Dowell* demonstrates, the concerns about undue infringement of state and local authority that arise on an initial determination that an institution of government is acting unconstitutionally may also arise when a government body urges that current circumstances and the public interest require that provisions of an existing injunctive decree be set aside. While care must be taken not to discourage settlements, a modification standard that is too demanding in this context may preclude the district court from paying adequate attention to the responsible officials' judgments as to why the requested relief is warranted under the circumstances. Principles of federalism dictate that the standards for evaluating modification motions in this setting reflect the defer-

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[17] On the other hand, in litigation brought by the federal government against a state or local government, concerns arising from the Supremacy Clause may justify the application of a different standard for the review of requests by defendants for the modification of consent decrees. For example, in decrees seeking to implement the Clean Water Act, 33 U.S.C. 1251 *et seq.*, and the Ocean Dumping Act, 33 U.S.C. 1401 *et seq.*, locally owned sewer systems and treatment works may be required to implement very expensive remedial actions, which later face taxpayer resistance or objections by neighbors to the proposed site of the facility. The requirements of federal supremacy would support a stringent modification test in those circumstances. See, *e.g.*, *United States* v. *County of Nassau*, 733 F. Supp. 563 (E.D.N.Y. 1990), aff'd, 907 F.2d 397 (2d Cir.) (modification denied). Similarly, public interest and Supremacy Clause concerns may warrant a more stringent test whenever the federal government seeks to enforce a consent decree against state or municipal defendants. This Court need not consider in this case whether a different standard should apply in those situations.

ence due to the legitimate, good-faith, and informed assessments of those officials. See *Ruiz*, 811 F.2d at 863 (Hill, J., concurring).[18]

* * * * *

In institutional reform litigation, we urge acceptance of a standard under which a request for modification will be permitted upon a showing that the requested modification is suitably tailored to adapt the decree to pertinent changes in circumstances, and is in keeping with the essential purposes of the decree. Such a standard is consistent with this Court's precedents and properly respects the utility and hybrid character of consent decrees. It provides the necessary flexibility, without sanctioning modifications that would improperly deprive a party of the benefit of its bargain.

In this case, the district court appeared to regard itself as bound by circuit precedent to apply the more stringent *Swift* standard.[19] Thus, it gave only cur-

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[18] This case involves institutional reform litigation brought against state and local entities, but analogous concerns rooted in equally pressing separation of powers principles are implicated where an agency of the federal government that is subject to a consent decree seeks modification of the decree's provisions. Cf. *Turner*, 482 U.S. at 85 ("Prison administration is * * * a task that has been committed to the responsibility of [the legislative and executive] branches, and separation of powers concerns counsel a policy of judicial restraint."). Where a consent decree is entered bearing upon a federal facility or program, a modification motion filed by the government officials lawfully charged with the authority and responsibility for administering that facility or program is entitled to respect from the courts. For reasons analogous to those discussed in the text, due regard for the scope of agency discretion in the light of changed conditions demands a modification standard that is not unduly rigid.

[19] But see note 5, *supra*.

sory consideration to the critical question whether changed circumstances might warrant a modification under an alternative standard. And, the court of appeals, in affirming, indicated no disagreement with the district court's approach.

Because the courts below appear to have misread the *Swift* decision, and thus to have placed improper reliance on the standard applied in that decision, the case should be remanded to permit full consideration of the facts and circumstances relevant to evaluation of the modification request under the appropriate standard.

CONCLUSION

The judgment of the court of appeals should be vacated, and the case should be remanded for further consideration in light of this Court's decision.

Respectfully submitted.

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